IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 4105 OF 1998.

1. Mary M.Rodriques,
   of Indian Inhabitant,
   residing at Rama Niwas,
   Room No.2, Goddev Village,
   Near Vithal Mandir,
   Bhayander (East).

2. Victoria D.Palekar,
   of Bombay, Indian Inhabitant,
   residing at Malue Daule Chawl,
   Room No.5, House No.357,
   Vasingda Khar Danda,
   Mumbai 400 052. ... Plaintiffs.

Versus.

1(a) Allyesas Andrew Ghersu (Son)
1(b) Rachel Andrew Ghersu (daughter)
2. Mary Anmdrew Ghersu
3. Manik Reddy,
4. Luiza D'Souza,
5. Fiano Narohna,
   All of Bombay, Indian Inhabitants,
   residing at Hutment No.H/W/R6/1/1,
   Situate at 121-A, Bazar Road,
   Bandra (W), Mumbai 400 050. ... Defendants.

Shri A.J.Almeida for the Plaintiffs.

None for the Defendants.

CORAM : ABHAY S.OKA, J.

DATED : 26th Sept., 2007.

ORAL JUDGMENT.:

1. The suit is listed under the caption of "Undefended Suits for Exparte decree".

2. According to the case of the Plaintiffs, one

Ignatius Ghersu owned, possessed and occupied a censused structure, more particularly described in paragraph 2 of the plaint. The said Ignatius died on 24th April 1986. The said Ignatius will hereinafter be referred to as "the said deceased". The Plaintiffs and the Defendants are the legal representatives of the deceased. During the pendency of the suit, the 1st Defendant expired and his legal representatives have been brought on record. According to the case of the Plaintiffs on the demise of the deceased, the Plaintiffs became entitled to 2/3rd share in the suit property described in paragraph 2 of the plaint and the 1st Defendant became entitled to 1/3rd share in the suit property. On the demise of the deceased, the suit property was transferred in the name of the Plaintiffs and the 1st Defendant. The Plaintiffs are the married sisters of the 1st Defendant. According to them taking undue advantage of the fact that they are away from the suit property the 1st and 2nd Defendants in consultation and collusion with the 3rd Defendant fabricated certain documents and developed the suit property. It is alleged that the 3rd Defendant has put up a structure with ground plus first floor. The ground floor is occupied by the 1st and 2nd Defendants and the first floor is occupied by 3rd to 5th Defendants.

3. The first Plaintiff through her Advocate issued notice dated 24th October 1997 to the 3rd Defendant

pointing out that the Plaintiffs are co-sharers of the property and the 3rd Defendant was carrying on construction without their consent and knowledge. The 3rd Defendant by his Advocate's letter dated 13th November 1997 contended that the Plaintiffs and the 1st Defendants have executed a development agreement, an irrevocable power of attorney and a declaration in favour of the third Defendant on 8th February 1995. It was alleged that the 1st Defendant has executed declarations on 30th April 1995 and 5th January 1996. Copies of the said documents were forwarded to the Advocate for the Plaintiffs. By Advocate's letter dated 2nd December 1997, the Plaintiffs informed the Advocate for the 3rd Defendant that the aforesaid documents were fabricated documents. By notice dated 27th July 1998, the Plaintiffs called upon the 1st and 2nd Defendants to give their share in the property. The first prayer in the present suit for a declaration that the aforesaid documents are null and void. The second prayer is for declaration that the Plaintiffs are entitled to 2/3rd share in the suit property. Prayer (c) is for passing a decree for partition and prayer (d) is for dispossessing the 3rd to 5th Defendants.

4. As stated earlier, the Defendants failed to file any written statement. The first Plaintiff has filed an affidavit dated 11th September 2007. In the said

affidavit, she has referred to zerox copies of the development agreement, irrevocable power of attorney and declaration dated 8th July 1995 allegedly executed by the Plaintiffs. She has stated that the said documents do not bear her signature. She stated that the said documents are fabricated documents. She has stated that even the declarations dated 30th April 1995 and 5th January 1996 are fabricated. Thus the 1st Plaintiff has denied the execution of the aforesaid documents allegedly executed in favour of the 3rd Defendant. The 2nd Plaintiff has also filed affidavit dated 18th September 2007. She has stated in the affidavit that the aforesaid three documents do not bear her thumb impression and the said documents are fabricated documents. The Plaintiffs have placed on record various documents along with a list. Apart from producing the correspondence between the parties, which is referred to above, a photo pass issued in the name of the deceased in respect of the suit property has been produced. The Plaintiffs have also produced a notice dated 12th December 1996 issued by the Tahsildar (Encroachment) Andheri-I, Bandra, Mumbai, in which it is stated that the suit property was held by the deceased. The said letter has been addressed to the Plaintiffs and the 1st Defendant. It is stated that without permission of the State Government, an illegal construction has been carried out on the said property.

5. The case made out by the Plaintiffs has been duly established by the aforesaid affidavits and the documents. The third Defendant is claiming development right on the basis of the agreement, power of attorney, and declaration dated 8th February 1995 allegedly executed by the Plaintiffs. There is a clear denial of execution of the said documents on the part of the Plaintiffs. The Plaintiffs have established that they have 2/3rd share in the suit property and the legal representatives of the 1st Defendant is having 1/3rd share. Without consent and concurrence of the Plaintiffs, the suit property could not have been developed by the 3rd Defendant. The Plaintiffs are, therefore, entitled to declaration to the effect that the documents mentioned therein are not binding on the Plaintiffs. A preliminary decree will have to be passed for partition of the property.

6. Hence the following order is passed:

i) It is hereby declared that the documents set out in prayer clause (a) of the plaint are not binding on the Plaintiffs.

ii) It is hereby declared that the Plaintiffs are entitled to 2/3rd share in the suit property and

the legal representatives of the 1st Defendant are entitled to 1/3rd share in the suit property.

iii) The suit property shall be partitioned for the purpose of handing over separate possession of the shares of the Plaintiffs. For that purpose, an Architect shall be appointed as a Court Commissioner for suggesting the partition. The partition, if any, shall be carried out thereafter after considering the report of the Commissioner in accordance with law.

iv) The Plaintiffs will be entitled to costs of the suit from the 1st and 3rd Defendants.

v) The Plaintiffs are permitted to take back the original photo-pass filed by them. Before handing over the custody of the original photo-pass, a zerox copy thereof duly attested by an officer of this Court shall be placed on record.

vi) Certified copy is produced.

Judge.